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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~71~~ - 1741

MAL BROS. CONTRACTING CO., and
GEORGE MALANGA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners George Malanga and Mal Bros. Contracting Co. pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on July 6, 1971.

Opinion Below

The United States Court of Appeals for the Third Circuit issued a written opinion in this matter on July 6,

1971. This case arose originally in the United States District Court for the District of New Jersey. The opinion of the Court of Appeals is appended hereto as Appendix A. It has no Federal Reporter citation as of the date of this petition.

Jurisdiction

The Judgment here sought to be reviewed was entered on July 6, 1971 by the Clerk of the United States Court of Appeals for the Third Circuit, and is appended hereto as Appendix B. That Judgment affirmed the decision and Final Judgment of the Honorable Lawrence A. Whipple, U.S.D.J. entered in the United States District Court for the District of New Jersey on August 11, 1970 which judgment overruled the invocation of the Fifth Amendment privilege against self-incrimination by Petitioner, George Malanga, and ruled that the privilege was not available to the said George Malanga with respect to the books and records of Mal Bros. Contracting Co., a three-brother general partnership, of which George Malanga was a general partner, or of any joint venture in which Mal Bros. Contracting Co. was a party. At the time the privilege was invoked George Malanga was a target for indictment who was called to testify before the United States Grand Jury in the District of New Jersey. The subpoena which prompted the appearance before the grand jury is appended hereto as Appendix C. Subsequently, George Malanga was indicted for allegedly filing false partnership returns which indictment was based upon the records obtained as a result of the District Court's denial of the privilege.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) which allows review by writ of *certiorari* of any judgment of a United States Court of

Appeals and this Court's Rule 19 (1)(b) setting forth as considerations for granting the writ conflict of the decision below with decisions of this Court and other federal courts. In addition the Petitioners claim the violation of their rights, privileges and immunities guaranteed under the Constitution of the United States, and more particularly the Fifth Amendment provisions as to self-incrimination and due process of law and the Fourth Amendment proscription of unreasonable searches and seizures. A petition for rehearing or rehearing in banc was forwarded to the Court of Appeals for the Third Circuit on July 20, 1971. No decision has been rendered as of the date of filing hereof.

Questions Presented

1. Is not a member of a three-brother general partnership entitled to invoke the privilege against self-incrimination with respect to the books and records exclusively of the partnership when subpoenaed to testify and produce such books and records before a federal grand jury at a time when the partner is a target for indictment?

2. Did not the decision of the Court of Appeals which denied to the Petitioner the right to invoke the privilege against self-incrimination on the sole ground that the three-brother general partnership's business was large in balance-sheet terms and was a financial success deny to the Petitioner the right to due process of law in that it unfairly discriminated against the members of the partnership solely because they were successful in business?

3. Does not the seizure of all the books and records of an active business general partnership constitute an

unreasonable seizure proscribed by the Fourth Amendment?

Constitutional Provisions Involved

This case involves those portions of the Fifth Amendment which guarantee to individuals both the right to be free from enforced self-incrimination and the right to due process of law and the Fourth Amendment guaranteeing freedom from unreasonable searches and seizures.

Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, * * * nor be deprived of life, liberty or property without due process of law; * * *."

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case and Basis of Federal Jurisdiction

Federal jurisdiction over this case has been exclusive from its inception. The only issues for review are concerned with the propriety of a Federal District Court final judgment denying to George Malanga the right to invoke before a federal grand jury the Fifth Amendment privilege against self-incrimination with respect to

the books and records of a three-brother general partnership of which he is a general partner and the unreasonableness of the scope of the subpoena which required the production of all of the books and records of the partnership business. The Fifth Amendment privilege was raised by George Malanga before a federal grand jury for the District of New Jersey.

The Court of Appeals affirmed the denial of the Fifth Amendment privilege with respect to the exclusively partnership papers ordered deposited with the District Court and catalogued under Orders of July 16, 23 and July 24, 1970, all three of which Orders ruled that no waiver of privilege resulted from the turn-over of the documents. The papers are now in the possession of the United States Attorney and the grand jury. These Orders are appended hereto as Appendices D, E and F respectively.

Mal Brothers Contracting Co. is a successful general partnership of three brothers engaged in the business of heavy construction. The partners file individual income tax returns and partnership information returns with the Internal Revenue Service. The business was created by a partnership agreement which limits the life of the partnership by declaring the partnership shall end upon the death of one of the partners.

The decision of the Court of Appeals was limited solely and exclusively to the books and records of the business of the partnership. The documents relating to joint venture participation which documents are and always have been kept separate and apart from partnership records were not made the subject of the July 23 and July 24, 1970 Orders. They were ordered produced under the terms of the Order of July 16, 1971, but they are in no way related to the matter before this Court. The decision of the Court of Appeals related solely to the partnership documents.

On December 30, 1970 the Grand Jury of the District of New Jersey issued a subpoena requiring Mal Bros. to produce six categories of its books and records for 1964 through 1969. The filing of a motion to quash the subpoena on the ground that the target was a partnership resulted in the U. S. Attorney withdrawing the subpoena. On December 16, 1970 the same trial judge who sat below in the instant matter had ruled in an unreported case that a member of a different, larger and more successful three-brother general partnership was entitled to invoke the privilege against self-incrimination under the Fifth Amendment with respect to its books and records.

On June 23, 1970 the Grand Jury issued a subpoena which was erroneously directed to a non-existent corporate entity "Mal Bros. Contracting Company, *Inc.*" This subpoena greatly expanded the scope of the categories of documents ordered produced from 6 to 36 categories which effectively required the production of all partnership records. On June 24, 1970 a similar, but not identical subpoena was directed to the partnership, again demanding production of the same 36 categories of documents. On July 16, 1970 the District Court denied a motion to quash the subpoena, ordered the production of the joint venture documents which are in no way related to this appeal and also ordered the production of the purely partnership records. Pursuant to the July 16, 1970 Order but under the protection of clauses in the Orders of July 23, 1970 and July 24, 1970, saving Fifth Amendment claims, purely partnership documents were deposited with the Court. It is these exclusively partnership documents which the Court of Appeals ruled are not subject to the Fifth Amendment privilege raised as to them by one of the three general partners. The

brief opinion filed in that Court holds, in spite of this Court's ruling in *Boyd* v. *United States,* 116 U. S. 616 (1886), that because the partnership has been successful in balance-sheet terms and because the partners for lack of education were required to employ specialists such as engineers and an accountant, one of its three general partners is not entitled to raise the Fifth Amendment privilege against self-incrimination even though the partner was a target for indictment by the grand jury issuing the subpoena. In addition the Court of Appeals held that there was nothing personal or private about the partnership papers, because the partnership had "all the aspects of a corporate enterprise." This holding was made in spite of the absence of the typical incidents of corporate business such as a certificate of incorporation making the entity a creature of the State, the limited liability enjoyed by corporate stockholders and a board of directors and officers as well as the fact that the partners are taxed as individuals, filing individual income tax returns and partnership returns. Indeed, the Court of Appeals failed to substantiate its conclusion with any citation of fact which would tend to show that the partnerships had "all the aspects of a corporate enterprise", and the record is devoid of any such facts. Apparently, the aspects of corporate enterprise referred to by the Court of Appeals could only be based on an evaluation of the partnership in balance sheet terms, for certainly the character of the ownership interest, *i.e.,* three partners, all brothers, and the finite life of the partnership augur against any intimation that the business is conducted as a corporate enterprise rather than as a partnership.

Reasons for Granting the Writ

I.

The decision of the Court of Appeals for the Third Circuit here sought to be reviewed is the first reported case to contravene this Court's long well-settled rule stated in *Boyd* v. *United States*, 116 U. S. 616 (1886) that individual general partners of business general partnerships are entitled to the protection of the Fifth Amendment privilege against self-incrimination with respect to the books and records of the partnership. In the Third Circuit it is a well-settled rule that partnership records are treated the same as personal records so far as constitutional rights are concerned. *Schultz* v. *Yeager*, 293 F. Supp. 794, 800 (D. N. J. 1967), aff'd 403 F. 2d 639 (3d Cir. 1968), *cert. denied*, 89 S. Ct. 1309 (1969); *United States* v. *Brasley*, 268 Fed. 59 (W. D. Pa. 1920). Equally well-settled is the rule that the compulsory production of a man's private papers is equivalent to compelling him to be a witness against himself in violation of the right to be free from compulsory self-incrimination guaranteed by the Fifth Amendment, a right which historically has been liberally construed by this Court to vouchsafe the personal security of the citizen. *Boyd* v. *United States*, 116 U. S. 616 (1886); See *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Ullman* v. *United States*, 350 U. S. 422 (1956). In the District of New Jersey where this matter arose the rule follows that laid down by this Court in *Boyd, supra* that the documents of a partnership are the private papers of the partners and are protected by the Fifth Amendment. *United States* v. *Linen Service Council*, 141 F. Supp. 511 (D. N. J. 1956); and see *United States* v. *Lawn*, 115 F. Supp. 674, 677 (S. D. N. Y. 1953); *United*

States v. *White*, 137 F. 2d 24, 28 (3d Cir. 1943) (Biggs, C.J., dissenting), rev'd 322 U. S. 694 (1944).

No reported case exists which denies the Fifth Amendment privilege as to the books and records of a general partnership. In *United States* v. *Cogan*, 257 F. Supp. 170 (S. D. N. Y. 1966) the court noted that its research failed to disclose a single case where a general partnership had been denied the Fifth Amendment privilege. Subsequent research likewise fails to disclose any such holding and none was cited by the Court of Appeals. See *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Cal. 1948). In *Cogan*, the court stated specifically that a balance sheet size test such as was the basis of the decision below herein is inappropriate for a determination of the availability of the privilege. The Court of Appeals cited the number of employees, the annual payroll and the amount of equipment owned by Mal Bros., stating that all of this taken together requires a denial of the privilege to the general partner who invoked it. Under the decision of the Court of Appeals a sole proprietor of a business or any individual which had become financially successful would not be entitled to invoke the privilege against self-incrimination since his books and records would not longer be "personal or private." See, *e.g. Stuart* v. *United States*, 416 F. 2d 459 (5th Cir. 1969); *Shelton* v. *United States*, 404 F. 2d 1292 (D. C. Cir. 1968), *cert. denied*, 89 S. Ct. 634 (1969); *United States* v. *United States Coin and Currency*, 393 F. 2d 499 (7th Cir. 1968); *United States* v. *Judson*, 322 F. 2d 460 (9th Cir. 1963).

In *Stuart* v. *United States*, *supra* and *United States* v. *Judson*, *supra*, the financial records of individuals were subpoenaed and were at the time in the hands of third parties, a lawyer (*Judson*) and an accountant (*Stuart*).

In both situations it was held, citing *Boyd* v. *United States, supra,* that the records were privileged under the Fifth Amendment in spite of the fact that they were in the hands of persons other than their owners who were holding them on behalf of the owners. Compare *Shelton* v. *United States, supra,* where the records of a voluntary association held by an individual raising the privilege were held subject to subpoena and without the protection of the Fifth Amendment. The *Shelton* court relied upon *McPhaul* v. *United States;* 363 U. S. 372 (1960), discussed *infra* and *United States* v. *White, supra,* and distinguished *Boyd* v. *United States, supra.* By contrast, the records of Mal Bros. were held by the partnership itself and its three general partners at the partnership office.

In still another type of case it was held, relying upon *Boyd* as a "landmark case" that where an individual refused to make incriminatory statements on a government form concerning gambling taxes for operating a gambling business, the individual could not have enforced against him a forfeiture statute. The court held that the government could not put a person to a choice of self-incrimination or forfeiture of property, a proposition dictated not only by *Boyd* but also by this Court's ruling in *Garrity v. New Jersey,* 385 U. S. 493 (1965) which held that a state could not force a man to choose between self-incrimination or automatic loss of employment as a policeman. These cases all make it clear that the Fifth Amendment privilege as to personal records will not lightly be disregarded nor will it be denied on mere technicalities such as the fact that the records were held by a third person when subpoenaed. Rather the court must look to the nature of the person or organization claiming that the records are privileged. Thus, in the

matter at bar the records at issue were held by the partnership at the partnership office and were composed entirely of the records of the business conducted by the partnership.

As to the nature of the organization, it is stipulated by all parties that Mal Bros. Contracting Co. consisted of three brothers engaged in business as a general partnership. The partnership operated solely for the personal and private interests of these three brothers. The Court of Appeals erroneously determined that the books and records of this three-brother general partnership were not personal and private. The error of the conclusion of the Court of Appeals is demonstrated by an examination and analysis of the cases relied upon by that Court which are wholly distinguishable and inapposite to the case at bar.

The Court of Appeals purported to rest its decision in the first instance upon the cases of *McPhaul* v. *United States*, 364 U. S. 372 (1960) and *United States* v. *Fleischman*, 339 U. S. 349 (1950). These are both cases involving legislative subpoenae directed to executive board members of non-business voluntary associations. In *McPhaul* this Court held that the Fifth Amendment privilege did not apply with respect to the books and records of the Civil Rights Congress, a political organization listed by the Attorney General as a subversive organization which was under investigation by a committee of Congress. In *Fleischman* this Court made a similar ruling regarding the records of the Joint Anti-Facist Refugee Committee, likewise a political organization on the Attorney General's list and under investigation by a congressional committee.

The political organizations in *McPhaul* and *Fleischman* each had in common the facts that they were non-business

voluntary associations each composed of large numbers of members with well-defined political interests and goals and equally well-defined officers and executive boards of directors separate and distinct from their general memberships. By virtue of the facts as well as the legal questions presented in those cases *McPhaul* and *Fleischman* clearly cannot control the decision in the instant matter which involves a three-brother business general partnership.

Also relied upon by the Court of Appeals was this Court's decision in *United States* v. *White,* 322 U. S. 694 (1944) in which a claim of privilege made by a labor union official regarding documents of the labor union was denied and in which the most viable general test for the availability of the privilege was set forth. In *White* this Court held that a labor union, a voluntary non-business unincorporated association with thousands of members as well as distinct offices and officers, devoted to the group interests of its members, was not the type of organization which embodied the private interests of its officers, and, therefore, an officer could not maintain a claim of privilege as to its records.

Since *Boyd* v. *United States, supra,* this Court had been faced with numerous claims of privilege as to the records of various groups or organizations. *Boyd* developed the rule that the privilege was available as to the records of a partnership but in *Hale* v. *Henkel,* 201 U. S. 403 (1906) it was held that the records of a corporation could not be so protected. In *Grant* v. *United States,* 227 U. S. 74 (1913) the *Hale* rule as to corporations was held to apply even to the documents of a dissolved corporation which were held by the sole stockholder thereof. In *Wilson* v. *United States,* 221 U. S. 361 (1911) this Court had ruled that a person who prepared and

had custody of corporate documents could not raise a privilege to protect them from disclosure. These cases did not, however, attempt to state any rule of general application. Thus, when faced again with a claim of privilege, but this time as to labor union records, this Court in *United States* v. *White*, *supra*, in passing upon the questions presented developed a test applicable as a general rule to all circumstances where the privilege was raised. The *White* rule sought to determine whether the organization whose records were claimed to be privileged was "personal" or "impersonal."

> "* * * The test, rather is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test." (*United States* v. *White*, *supra*, 322 U. S. 694, 701 (1944).)

Under this test this Court unanimously determined that a labor union was not an organization which could be deemed as "personal." Not only did it have thousands of members but also it enjoyed a special legal status invested with the public interest in a way similar to a corporation, its members had no associational choice as to their fellow members who had common institutional goals but whose individual actions could not bind the others unless the action were union authorized or ratified. In

addition the union existed for all practical purposes perpetually and by virtue of and under the protection of an intricate scheme of federal and state statutory law. Its existence was unaffected by the death or withdrawal of any single member or even a large local group of members. Thus, by virtue of its size in terms of membership and the scope of its activities this Court held that a union clearly was an impersonal organization not entitled to the Fifth Amendment privilege. The substantial conceptual differences between unions and business partnerships were particularly important to Circuit Judge Biggs whose reasoning in his dissenting opinion in the Third Circuit eventually prevailed in this Court's determination of the *White* case. See *United States* v. *White*, 137 F. 2d 24, 27 (3d Cir. 1943), rev'd, 322 U. S. 694 (1944). In the case of *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Cal. 1948) it was held that partnership records are outside the scope of *White* and are, therefore, entitled to the privilege.

The Court of Appeals in the instant matter held that even under the *White* test the records of the Mal Bros. partnership could not be protected by the Fifth Amendment privilege. Its rationale was that in balance sheet terms the partnership was so large that it had "all the aspects of a corporate enterprise." As has previously been noted herein, the Court failed to set forth specifically what facts support this conclusion, except to note the size of the annual payroll, the number of employees and the value of equipment owned; nor did it distinguish the cases since *White* which have without exception held that the records of business general partnerships are privileged and, further, that the financial size of the partnership has never been the criterion of decision. Nor did the Court of Appeals attach any significance to the

fact that the partner was, at the time the records were subpoenaed, a target for indictment.

In *United States* v. *Cogan*, 257 F. Supp. 170 (S. D. N. Y. 1966) the government had directed a subpoena duces tecum to the "Custodian of the Records" who was the target of the grand jury's investigation. The subpoena sought the compulsory production of the records of six general partnerships, four of which succeeded one another in point of time, two of which separately overlapped each other and the four successive partnerships and one of which had 12 general partners. The government argued that the partnership papers were not personal or private, thus attempting to bring them within the ambit of the *White* rule. The Court held that the partnerships were small enough "by any standards" to fall without the reach of *White*. There was nothing to indicate that the partners acted in defined representative capacities for the others, nor was there anything to indicate any limited partnership or suggestion of investor status. In short, there was no deviation from the standard partnership pattern of joint and several powers and responsibilities. 257 F. Supp. at p. 174. The court stated:

> "* * * It may be that the principles of *White*, will reach partnerships with scores or hundreds of members, where the relationship is not and cannot be face-to-face, where there is an inevitable measure of bureaucratization, of defined 'office' apart from particular incumbents of permanence, 'institutionalization,' and action by designated agents in 'representative capacities. * * *" (257 F. Supp. at p. 174)

Importantly, the Court noted that the financial size of the enterprise has never been the criterion of decision. It was said that

> "* * * the focus has been on the extent and character of the ownership group, not on the size of the business in balance-sheet terms. * * * [N]either the size nor the luminous clientele of the partnerships, nor both together, can sustain the Government's position." (257 F. Supp. at p. 74)

Finally the Court commented upon and rejected the Government's contention that "partners lose the privilege when their ventures become larger or colder than intimate groups in the nature of 'family partnerships.'" The Court said:

> "* * * There is really no solid authority for the Government's contention, and we reject it. The Fifth Amendment privilege would become a chancy thing if its availability came to turn on inquiries into the states of comparative intimacy and trust among kinfolk, mere friends, or small groups of 'strictly business' associates." (257 F. Supp. at p. 74)

The important issue in determining the availability of the privilege is the nature of the organization and more specifically whether it is operated for the personal gain of the person claiming the privilege or, rather, for the benefit and interest of others. Clearly labor unions, (*White*) political organizations, (*McPhaul* and *Fleischman*) or corporations (*Hale* v. *Henkel, Wilson, Grant*) all of which partake of virtually unlimited life and whose members or stockholders enjoy limited liability are operated for and represent the group interests of those persons. Can it be said that the nature of these entities and the interests of their members are analogous to the individualized interest of a member of a three-brother business general partnership? The holding of

the Court of Appeals draws such an analogy even though there are well-settled cases following *United States* v. *White,* which deal with business general partnerships which are directly on point and hold to the contrary, as well as the decision of this Court in *Boyd* v. *United States, supra,* which has never been reversed.

The Court of Appeals did not cite *United States* v. *Cogan, supra,* in its opinion, nor did it cite any other case dealing with general partnerships raising claims of privilege with respect to their books and records. See *e.g. United States* v. *Linen Service Council,* 141 F. Supp. 511 (D. N. J. 1956); *United States* v. *Lawn,* 115 F. Supp. 674 (S. D. N. Y. 1953); *In re Subpoena Duces Tecum,* 81 F. Supp. 418 (N. D. Cal. 1948). Rather it chose to rely upon the inapplicable voluntary association cases, *McPhaul, supra* and *Fleischman, supra,* and to misapply the test of *United States* v. *White, supra* by employing a balance sheet test rather than looking to the nature of the ownership interest. The decision below equates financial success with impersonality. In so holding the Court of Appeals does violence to the entire line of cases involving non-corporate business entities from *Boyd* v. *United States, supra,* through *United States* v. *White, supra,* to *United States* v. *Linen Service Council, supra, United States* v. *Cogan, supra,* and even the unreported prior but recent decision of the trial judge below involving a larger and more successful general partnership. Clearly the decision of the Court of Appeals conflicts with the applicable decisions of this Court and of all the other lower federal courts which have considered the question of privilege as to the books and records of business general partnerships, and has so far departed from the accepted and usual course of judicial proceedings in such matters by sanctioning such a departure by the trial

court as to call for an exercise of this Court's supervisory powers.

In addition, the Court of Appeals failed to recognize that a difference may exist between the rule applicable to exclusively partnership papers such as those which were the subject of the Orders of July 23 and 24, 1970, and thus this appeal, and papers evidencing partnership participation in joint ventures which were clearly discernible and were kept separate and apart from the partnership's papers and are in no way encompassed within the papers made the subject to the Orders of July 23 and 24, 1970. Exclusively partnership papers present the clearest case for allowance of the privilege which, it is submitted, was erroneously denied by that Court's decision.

It is apparent that the Court of Appeals denied the privilege to Mal Bros. and its partners with respect to purely partnership papers because the partnership has been successful and because the partners for lack of formal education were not engineers or accountants but had to employ individuals to perform these functions. Under the ruling of that Court a man who has no formal education but develops a successful business as a sole proprietor which must hire employees to help operate, including employees with specialized training such as engineers, architects and accountants would lose his constitutional privilege against self-incrimination, although such a result has never been thought possible. Of course, the assertion of this constitutional right would not bar the government from calling the employees to testify as to what they have seen and heard as well as the part they may have taken in the operation and functioning of the business. Thus, the individual rights the Fifth Amendment was meant to protect remain intact while not de-

priving the government of investigatory tools based on the size of the business.

Due process of law, as guaranteed by the Fifth Amendment includes the right not to be treated unequally and unfairly merely because the business of the partnership is a success or failure or because a partnership requires the services of employees to perform designated functions. The clear effect of the decision of the Court of Appeals is to give shades of meaning to the fundamental Fifth Amendment right not based upon any rational standards but rather based upon subjective evaluations and considerations such as the number or types of employees or the dollar-volume of the business. Is the revocation of the Fifth Amendment privilege to turn on whether the business does $100,000, $500,000 or one million dollars of business per year? Or on whether the business employs 10 persons or 200? Or whether the partners are well-educated or poorly educated and require the employment of specialists such as engineers or accountants?

It is submitted for all of the reasons set forth herein that the Court of Appeals in its decision overlooked the specific cases directly on point concerning exclusively general partnership papers and misapprehended the force and effect of those cases cited in support of the decision made. In addition it is submitted that the Court of Appeals erroneously found as a fact that the general partnership in question "had all of the aspects of a corporate enterprise." Therefore, the petitioners pray that this Court grant their petition for writ of *certiorari* to bring the decision of the Court of Appeals into line with the previously decided cases in this Court and elsewhere inasmuch as the determination of the Fifth Amendment question herein is one of unique importance not

only to the petitioners but to all persons who operate business general partnerships and sole proprietorships. In addition, it is submitted that the decision of the within case conflicts with the previous and long-standing decisions of the courts of the Third Circuit cited herein as well as the general rule prevailing elsewhere and the never overruled decision of this Court in *Boyd* v. *United States,* 116 U. S. 616 (1886) that general partners may invoke the privilege against self-incrimination with respect to the books and records of general partnerships of which they are members.

II.

The subpoenae which commanded the production of the documents of the general partnership Mal Bros. Contracting Co. was equivalent to the long-despised general warrants which the Fourth Amendment was meant to prevent. *Stanford* v. *Texas,* 379 U. S. 476 (1965); *Boyd* v. *United States,* 116 U. S. 616 (1886). The law is clear that a subpoena may not be so expansive in scope as to be oppressive. This Court recently declared in *See* v. *City of Seattle,* 387 U. S. 541, 544 (1967) that a subpoena must be.

> "* * * sufficiently limited in scope, relevant in purpose and specific in directive that compliance will not be unreasonably burdensome."

See also *Schultz* v. *Yeager,* 293 F. Supp. 794, 799 (1967), aff'd 403 F. 2d 639 (3d Cir. 1968), *cert. denied,* 89 S. Ct. 1309 (1969); *In re Subpoena Duces Tecum,* 203 F. Supp. 575 (S. D. N. Y. 1961); *In re Addonizio,* 53 N. J. 107 (1968) (Weintraub, C.J.).

Unlike the Fifth Amendment privilege against self-incrimination the Fourth Amendment privilege against unreasonable searches and seizures applies to and protects all persons, organizations and business entities of whatever type and description. *See* v. *City of Seattle,* 387 U. S. 541 (1967); *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); See also *Goodman* v. *United States,* 285 F. Supp. 245 (C. D. Calif. 1968); *United States* v. *Lipshitz,* 132 F. Supp. 519 (E. D. N. Y. 1955); *cf. Katz* v. *United States,* 389 U. S. 347 (1967); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *Abel* v. *United States,* 362 U. S. 217 (1960).

The subpoena served upon Mal Bros. Contracting Co. listed 36 categories of documents which the partnership was to produce. Perusal of this list leaves no doubt but that the subpoena commanded the production of all of the records of the partnership including not only financial items but also, *inter alia,* architectural and engineering documents and correspondence.

After entry of the July 23 and 24, 1970 Orders cataloging the documents turned over to the Grand Jury the partnership had no records with which to operate its business. Indeed, the business was required to operate, effectively, out of the office of the United States Attorney where the records were kept, and at the behest of the U. S. Attorney and his Assistants who controlled all access to the business records of the partnership.

It is no answer to these contentions that the subpoena specifically listed categories of documents to be produced, for to come within the command of *See* v. *City of Seattle, supra,* the character of the documents must be "sufficiently limited in scope." 387 U. S. at p. 544. In no way can it be argued that a subpoena which in effect requires

the production of all of the records of a business, and the effect of compliance therewith is to paralyze a business organization, is sufficiently limited in scope to avoid being held unreasonable and, therefore, oppressive. The subpoena herein is the very kind of abuse of governmental power that moved the People to propose and approve the Fourth Amendment. The history of the events and circumstances leading to the adoption of the Fourth Amendment has often been traced by this Court and others and need not be repeated at length. See, *e.g. Boyd* v. *United States,* 116 U. S. 616 (1886). It is sufficient to note that the general warrants issued by the King in Colonial times permitted searches and seizures without limit as to place and scope. See *Stanford* v. *Texas,* 379 U. S. 476 (1965). In modern times the effect of the execution of a general warrant such as the subpoena herein is and has been a death blow to a partnership business organization such as Mal Bros. Contracting Co. The subpoena herein cannot be distinguished from a general warrant naming Mal Bros. and is therefore proscribed by the Fourth Amendment. Clearly, it is unreasonable and should have been quashed on the basis of the Fourth Amendment.

It is submitted that the error in not quashing the subpoena in question involves important and special questions of constitutional magnitude in view of the conflict between this Court's rulings as to the scope and reasonableness of subpoenae and the refusal to quash the subpoena herein. Therefore, this Court should grant the within petition for a writ of *certiorari* to resolve these matters in a manner consistent with the prior holdings of this Court.

CONCLUSION

It is submitted that the Court of Appeals decided substantial constitutional questions in a manner at variance with the rules established in long well-settled and applicable decisions of this Court and in conflict with the decisions of other federal courts on the same and similar questions. Therefore, for all of the reasons set forth herein it is submitted that there are special and important reasons for this Court to grant the petition for the writ of *certiorari*.

Respectfully submitted,

SCHAPIRA, STEINER & WALDER,
Attorneys for Petitioners, Mal Bros. Contracting Co., and George Malanga,
By JEFFREY BARTON CAHN,
an associate of the firm.

JUSTIN P. WALDER,
Of Counsel to Petitioners.

JEFFREY BARTON CAHN,
On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19,296 and 19,297

In the Matter of Grand Jury Subpoenas

Re: MAL BROTHERS CONTRACTING CO. and
MAL BROTHERS CONTRACTING COMPANY, INC.
GEORGE MALANGA,

Appellant in No. 19,296

MAL BROTHERS CONTRACTING CO.,

(D. C. Criminal No. 312-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued April 7, 1971

Before GANEY, VAN DUSEN and GIBBONS, *Circuit Judges*

Appendix A

OPINION OF THE COURT

(Filed July 6, 1971)

GANEY, *Circuit Judge.*

Certain officials of the City of Newark were indicted as being part of organized crime (Criminal No. 548-69) concerning matters pertaining to the city's official business. During their trial, Irving Kantor testified that he had created a front corporation, Kantor Plumbing Supply Company, to serve as a funnel through which large sums of money were passed from contractors to city officials. He stated that Mal Brothers Contracting Co. ("Mal Bros.") was one of the contractors, and on June 10, 1970, checks of Mal Bros. to Kantor Supply were introduced into evidence. On behalf of the Federal Grand Jury, then in session, subpoenas *duces tecum* were served on La Fera Contracting Co. ("La Fera") and C. F. Melanka & Sons, Inc. ("Melanka"), two of the contractors named by Kantor.

The appeal before us is the culmination of events, brought to a head on June 11, 1970, when La Fera and Melanka claimed they were unable to comply with the subpoenas because the records called for production by them were in the custody of Mal Bros., pursuant to an agreement creating an entity entitled "Mal Bros. Contracting Co.—York Street Drainage" ("York Street Joint Venture").

On June 16, 1970, Louis J. Malanga sent reply letters to La Fera and Melanka setting forth his refusal to turn over any joint venture documents on the advice of counsel. The following day, a subpoena *duces tecum* was served upon Mal Brothers Contracting Co., Inc., to produce the

records of that entity from the beginning of 1965, to June 1, 1970. Upon being advised that the "Inc." was a typographical error, the United States Attorney issued an identical subpoena against Mal Bros. as a partnership. Mal Bros. moved to quash both subpoenas, contending, in essence, that it conducted business solely as a partnership and that, accordingly its records were protected from Grand Jury inspection by the 4th and 5th Amendments.

On June 23, 1970, a motion to quash the subpoenas was filed by Mal Bros. and on July 16, 1970, the district court

> "ORDERED that the motion to quash the subpoena duces tecum served on Mal Bros. Contracting Co. is denied; it is further
>
> "ORDERED that Mal Bros. Contracting Co. produce before the Federal Grand Jury, on or before July 21, 1970, all documents and records relating to the York Street Joint Venture, also known as Mal Bros. Contracting Company—York Street Drainage, and it is further
>
> "ORDERED that Mal Bros. Contracting Co. produce before the Federal Grand Jury on or before July 21, 1970, all documents and records relating to its participation in any joint ventures in the State of New Jersey with respect to any federal, state, county, municipal or bi-state agency or any agency or authority of the above categories which documents and records it holds in its capacity as custodian to which it has a right to access by virtue of its participation therein, and it is further

Appendix A

> "ORDERED that Mal Bros. Contracting Co. produce, before the Federal Grand Jury, on or before July 21, 1970, all partnership records requested by the above-mentioned subpoena duces tecum, without prejudice to assert any constitutional privilege to such records."

From this order of the district court of July 16, 1970, George Malanga and Mal Bros. Contracting Co. appealed to this court.

On July 17, 1970, the United States Attorney was informed that portions of the York Street Joint Venture records presently could not be located and Mal Bros. had requested its bank to photostat all checks pertaining to the joint venture, as well as its bank statements, for the purpose of submitting them to the Government. However, on July 20, 1970, Mal Bros. turned over to the United States Attorney all records of York Street Joint Venture which it claimed could be located and stated that it had been advised by its accountant that it could destroy the bookkeeping and accounting records after a three-year period.

On July 21, 1970, Mal Bros., represented by George Malanga, appeared before the Grand Jury and refused to produce any documents requested under the order of July 16, 1970, with the exception of two small manila packages labeled "Cash Disbursements, 1968 and 1969" and with it asserted his claim of privilege against self-incrimination under the 5th Amendment with respect to the contents of the envelopes.

On July 24, 1970, Mal Brothers Contracting Co. and George Malanga, a partner thereof, in accordance with

the prior order of the court, voluntarily turned over a list of thirty-six documents, including deposit slips, accounts payable ledger cards, cash receipts journals, etc., which the court directed be secured for the court and should, in no wise, constitute a waiver of rights or privileges of Mal Bros. Contracting Co. or any partner thereof. A similar group of records falling under 13 different categories had been turned over to the court by the partnership and George Malanga on July 23, 1970, subject to a similar direction by the court that the turning over of these documents "in no wise shall constitute a waiver of rights or privileges . . ."

On July 27 and 28, 1970, an evidentiary hearing was held on a show cause motion to resolve the issues of (1) whether Mal Bros. and George Malanga was in "civil" contempt of the July 16th order, and (2) whether George Malanga could properly assert his 5th Amendment privilege as to the Mal Bros. partnership records.

On August 2, 1970, on the basis of stipulated facts and findings made by the court from evidence, the court adjudged Mal Bros. and George Malanga to be in "civil" contempt of the July 16th order, and directed Malanga to be incarcerated and Mal Bros. to pay a daily fine of $1,000 until they purged themselves of contempt or until the Grand Jury ceased to exist.

On August 11, 1970, the district court entered a final judgment, from which these appeals are taken, which judgment included this language:

> ". . . the Court having found that Mal Bros. Contracting Co., an alleged partnership, is a type of organization which is so impersonal in the scope of

its membership and activities that it cannot be said to embody or represent a purely private or personal interest of its constituents, but rather embodies their common or group interests only, and that as a consequence thereof the records of Mal Bros. Contracting Co. are held by that company in a representative capacity and are not the private records of the respondent George Malanga . . ., it is on this 11th day of August, 1970

"ORDERED that the respondent, George Malanga, is not entitled to invoke the privilege of self-incrimination with respect to the books and records of Mal Bros. Contracting Co., or any joint venture in which it is a party, and the invocation of said constitutional privilege by George Malanga is not available and is therefore overruled."

On February 3, 1971, this court filed a memorandum order adverting to the voluntary turnover of the categories of records for the years 1968 and 1969, of the partnership of Mal Bros. Contracting Co. and recited again that, according to the terms of the July 23 and July 24 orders, the turning over of these documents should in no wise constitute a waiver of rights and privileges of Mal Bros. Contracting Co., or any partner thereof. In its memorandum this court further held that, "Under these circumstances, the final judgment of August 11, 1970, was an appealable order insofar as it applied to the records turned over to the court under the orders of July 23 and July 24, 1970, only. See *Cobbledick* v. *United States*, 309 U. S. 323, 328 (1940) (citing *Perlman* v. *United States*, 247 U. S. 7, 13)." And it further ordered that "the above mentioned appeals are dismissed [which were

from the final judgment of August 11th, ordering that George Malanga was not entitled to the privilege against self-incrimination as to certain books and records], except insofar as they challenge that part of the district court order of August 11, 1970 (40a) which applies to the documents in the custody of the district court pursuant to the orders of July 23, 1970 (28a) and July 24, 1970 (31a)."

Accordingly, the only question left open presently before this court is whether George Malanga can assert his privilege of self-incrimination under the 5th Amendment with respect to the books and records voluntarily turned over by him to the court on July 23rd and 24th, 1970.

The determination of whether a partnership entity obtains here such as to render an individual partner immune from producing partnership records which might possibly be the basis of a criminal charge against him, has had a rather tortious [sic] road through the various courts' interpretation of the 4th and 5th Amendments.

Beginning with *Boyd* v. *United States*, 116 U. S. 616, the Court there held that an order requiring the claimants of goods to produce a certain invoice in court for the inspection of the government was violative of both the 4th and 5th Amendments, of the 4th Amendment particularly because it was equivalent to an actual entry on the premises and a search for and seizure of papers which constituted an unreasonable search, and violative of the 5th Amendment because it was forbidden therein to compel a man to be a witness against himself. Later, the assumption developed as the issue of compulsory production of papers by process became a live issue at the turn of the century and was resolved solely on 5th Amendment

grounds by successive modifications of *Boyd.* In *Hale* v. *Henkel,* 201 U. S. 43, the Supreme Court virtually dismissed *Boyd's* 4th Amendment analysis holding that the 4th Amendment was no bar to a court's requiring a person or entity to produce documents in any case where the order was not unreasonable in its scope. In this instance, the Court distinguished the right of an individual from that of a corporation on the ground that the corporation was a creature of the state.

Later, in *Wilson* v. *United States,* 271 U. S. 360, [sic] the Supreme Court relied on the fact that a corporation owned the documents and that Wilson was simply holding them in a custodial capacity and in so doing read *Boyd, supra,* as applying only to private papers. P. 380.

In *Grant* v. *United States,* 227 U. S. 74, the Supreme Court ignored the custodial-ownership distinction and extended *Wilson, supra,* to cover the case of documents owned by the sole stockholder of a dissolved corporation.

Thus in response to a burgeoning of the economy in an open society, the Court was led to examine business documents in aid of regulation of business activities and in *United States* v. *White,* 322 U. S. 694, 701, the Court stated:

> ". . . The test, rather is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on be-

half of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.".

The intimation in *White, supra,* that the privilege of asserting the 5th Amendment, might be dependent upon the degree of impersonality of the organization asserting it must be deemed not essential to the core of the decision and the test that it makes requisite.

Following *White,* the Supreme Court has routinely denied the 5th Amendment privilege to unincorporated associations without discussion of size, impersonality or other circumstances. *McPhaul* v. *United States,* 364 U. S. 372; *United States* v. *Fleischman,* 339 U. S. 349.

However, when we examine the findings of fact made by the court below, we can clearly see that they were not erroneous and that even if we accept the impersonality test, this entity contravenes it by reason of the fact that the court found that the entity employed 200 to 250 persons a year with an annual payroll in excess of $1,000,000; that its annual receipts were approximately $10,000,000 a year excluding joint ventures with other companies; and that it owned equipment valued at approximately $1,000,000. Further, none of the partners in the entity were engineers or were familiar with the accounting and bookkeeping end of the business.

In our judgment, it is essentially clear that the defendants here had all the aspects of a corporate enterprise and that there was nothing personal or private in connection with the papers solicited from them under the subpoena herein. There can be no rational basis for up-

holding a claim to 5th Amendment protection to conduct a business operation as a personal rather than a corporate operation.

The judgment of the district court overruling appellant, George Malanga's claim of 5th Amendment privilege with respect to the books and records of Mal Bros. will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment and Order of Affirmance of U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19296/7

In the Matter of Grand Jury Subpoenas
Re: MAL BROTHERS CONTRACTING Co. and
MAL BROTHERS CONTRACTING COMPANY, INC.
GEORGE MALANGA,

Appellant in No. 19296

MAL BROTHERS CONTRACTING Co.,

Appellant in No. 19297

(D. C. Criminal No. 312-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

Present: GANEY, VAN DUSEN and GIBBONS, *Circuit Judges.*

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 11, 1970, which judgment overruled appellant George Malanga's claim of Fifth Amendment privilege with respect to the books and records of Mal Bros. be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS F. QUINN

July 6, 1971.

Clerk

APPENDIX C

Subpoena

AO Form No. 110 (Rev. 5-60)

Subpoena to Testify Before Grand Jury

DJW:ama
70 1967

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

To: Mal Bros. Contracting Co.
12 Fairfield Crescent
West Caldwell, New Jersey
By: Louis J. Malanga or Responsible Officer

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Federal Square, Federal Bldg, Rm 502 in the city of Newark on the 24 [JJB] day of June 1970 at 10 o'clock A.M. to testify before the Grand Jury and bring with you any and all documents during the period of January 1, 1965 to June 1, 1970 included in the categories of documents listed in Schedule "A" hereto.

This subpoena is issued on application of the United States.

FREDERICK B. LACEY
United States Attorney
By: DONALD J. WILLIAMSON 645-2377
Assistant U. S. Attorney

Dated June 23, 1970

ANGELO W. LOCASCIO
Clerk

By ELIZABETH M. [Illegible]
Deputy Clerk

Appendix C

SCHEDULE "A"

1. General ledgers.
2. General journals.
3. Cash disbursement journal.
4. Cash receipts journal.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Records of equipment rental and leasing.
15. Financial statements.
16. Bank deposit tickets.
17. Retained copies of income tax returns.
18. Retained copies of payroll tax returns.
19. Purchase journals.
20. Accounts payable ledgers.
21. Accounts receivable ledgers.
22. Stock transfer book.

Appendix C

23. Corporate minutes.
24. Corporate charter.
25. Telephone Company Statement of calls and telegrams.
26. Architectural and engineering plans, drawings and specifications.
27. Shop drawings.
28. Records of permit and license fees.
29. Requisitions by separate subcontractors and trade payment breakdowns.
30. All other requisitions, invoices and estimates.
31. Bids, solicitations to bids and worksheets prepared in connection therewith.
32. Records of payment for all materials, supplies & equipment rentals.
33. Delivery tickets.
34. Construction cost estimates.
35. Bar charts and other progress schedules.
36. Written communications or records of oral communications with subcontractors, venders, suppliers, architects, public officials and authorities and public utilities.

APPENDIX D

Order of July 16, 1970

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN THE MATTER
of
A GRAND JURY SUBPOENA SERVED UPON LOUIS J. MALANGA
RE: MAL BROS. CONTRACTING CO. AND MAL BROS. CONTRACTING COMPANY, INC.

ORDER

(Filed July 16, 1970)

This matter having been opened before this Court by Mal Bros. Contracting Co., by their attorney, Justin P. Walder, Esquire, to quash two subpoena duces tecum served by the Government on Mal Bros. Contracting Co., Inc., and Frederick B. Lacey, United States Attorney for the District of New Jersey, by Donald J. Williamson, Assistant United States Attorney, appearing for the Government, and the Court having heard oral arguments of both parties and having duly considered the briefs and pleadings of both parties;

It is on this 16th day of July, 1970

Appendix D

ORDERED that the motion to quash the subpoena duces tecum served on Mal Bros. Contracting Co. is denied; it is further

ORDERED that Mal Bros. Contracting Co. produce before the Federal Grand Jury, on or before July 21, 1970, all documents and records relating to the York Street Joint Venture, also known as Mal Bros. Contracting Company—York Street Drainage, and it is further

ORDERED that Mal Bros. Contracting Co. produce before the Federal Grand Jury on or before July 21, 1970, all documents and records relating to its participation in any joint ventures in the State of New Jersey with respect to any federal, state, county, municipal or bi-state agency or any agency or authority of the above categories which documents and records it holds in its capacity as custodian or to which it has a right to access by virtue of its participation therein, and it is further

ORDERED that Mal Bros. Contracting Co. produce, before the Federal Grand Jury, on or before July 21, 1970, all partnership records requested by the above-mentioned subpoena duces tecum, without prejudice to assert any constitutional privilege to such records.

/s/ LAWRENCE A. WHIPPLE
U. S. District Judge

APPENDIX E

Order of July 23, 1970

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of Grand Jury Subpoenas Re:

MAL BROS. CONTRACTING CO. and
MAL BROS. CONTRACTING COMPANY, INC.

ORDER

(Filed July 23, 1970)

This matter being opened to the Court by Justin P. Walder, Attorney for Mal Bros. Contracting Co. and George Malanga, a partner thereof, and in accordance with the prior Order of the Court, the following category of records for the years 1968 and 1969 of the partnership, Mal Bros. Contracting Co. are being turned over to the Court:

Deposit Slips

Accounts Payable Ledger Cards

Statements and cancelled checks

Purchase Journals

Appendix E

Cash Disbursements

Payroll Ledger Cards

Payroll Journals

Payroll Taxes

Cash Receipts Journals

Sales Journals

General Ledgers

Income Tax Returns

Financial Statements

It is on this 23rd ~~day~~ of July, 1970

ORDERED and UNDERSTOOD that the aforementioned documents shall remain under the sole custody and control of this Court and shall in no event be turned over to or made available for examination or copying by the United States Attorney for the District of New Jersey or any other governmental agency or anyone else without prior notice to Justin P. Walder, counsel for Mal Bros. Contracting Co. and George Malanga, and upon the entry of an Order of this Court; it is further

ORDERED that the turning over of these documents is to secure for the Court the existence of the same and in nowise shall constitute a waiver of rights or privileges of Mal Bros. Contracting Co. or any partner thereof.

LAWRENCE A. WHIPPLE,
J.U.S.D.C.

APPENDIX F

Order of July 24, 1970

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In the Matter of

A Grand Judy Subpoena served upon
MAL BROS. CONTRACTING CO.

ORDER

(Filed July 24, 1970)

This matter being opened to the Court by Justin P. Walder, attorney for Mal Bros. Contracting Co. and George Malanga, a partner thereof, and in accordance with the prior Order of the Court and subpoena directing the production of all partnership records of Mal Bros. Contracting Co. for the period January 1, 1965 to June 1, 1970, the attached document of Mal Bros. Contracting Co. sets forth the category of records which are being turned over to the Court and are deemed to supplement the Order heretofore entered by this Court on July 23, 1970,

It is on this 24th day of July, 1970,

ORDERED and UNDERSTOOD that the aforementioned documents shall remain under the sole custody and control of

this Court and shall in no event be turned over to or made available for examination or copying by the United States Attorney for the District of New Jersey or any other governmental agency or anyone else without prior notice to Justin P. Walder, counsel for Mal Bros. Contracting Co. and George Malanga, and upon the entry of an Order of this Court; it is further

ORDERED that the turning over of these documents is to secure for the Court the existence of the same and in nowise shall constitute a waiver of rights or privileges of Mal Bros. Contracting Co. or any partner thereof.

LAWRENCE A. WHIPPLE,
J.U.S.D.C.

THE MAL BROS. CONTRACTING CO.
CONTRACTORS & ENGINEERS

FAIRFIELD CRESCENT—WEST CALDWELL, N. J. 07006
CAPITAL 6-8844-5-6

Submitted the following;

1. General Ledgers
2. General Journals (same as No. 1)
3. Cash Disbursement Journals
4. Cash Receipt Journals
5. Vouchers (same as No. 6 & No. 7)
6. Paid Bills (same as No. 5 & No. 7)
7. Invoices (same as No. 5 & No. 6)

Appendix F

8. Billings (same as No. 14)
9. Bank Statements
10. Cancelled Check & Check Stubs
11. Payroll Records
12. Contracts & Copies of Contracts
13. Subcontracting agreements and purchase orders
14. Records of equipment rental and leasing
15. Financial Statements
16. Bank Deposits
17. Retained copies of income tax returns
18. Retained copies of payroll tax returns
19. Purchase Journals
20. Accounts Payable Ledgers
21. Accounts receivable ledgers (Cannot give up Active)
22. Stock transfer book (None)
23. Corporate minutes (None)
24. Corporate charter (None)
25. Telephone Company Statement of calls and telegrams
26. Architectural and engineering plans, drawings and specifications
27. Shop drawings
28. Records of permit and license fees

Appendix F

29. Requisitions by separate subcontractors and trade payment breakdowns

30. All other requisitions, invoices and estimates (same as 29)

31. Bids, solicitations to bids and worksheets prepared in connection therewith.

32. Records of payment for all materials, supplies and equipment rentals (same as 6, 7 & 8)

33. Delivery tickets (same as 6)

34. Construction cost estimates

35. Bar charts and other progress schedules

36. Written communications or records of oral communications with subcontractors, vendors, suppliers, architects, public officials and authorities and public utilities.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-174

MAL BROS. CONTRACTING CO. and GEORGE MALANGA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The background of this case is set forth in the opinion below (Pet. App. A, at 2a-7a) and need not be repeated here. Petitioners were held in civil contempt for failing to produce records of Mal Bros. Contracting Company before a federal grand jury following a subpoena and court order. The court of appeals affirmed. The sole issue of substance[1] is whether the courts below properly rejected petitioner

[1] There is patently no merit to petitioners' ancillary contention that the grand jury subpoenas were the equivalent of a general search warrant (see Pet. 20-22).

George Malanga's Fifth Amendment claim of privilege against self-incrimination with respect to the records of a partnership of which he was one of three general partners.

The district court conducted an evidentiary hearing on the claim and held that the Fifth Amendment privilege was not available to petitioner Malanga. It applied the test of *United States* v. *White*, 322 U.S. 694, 701:

> [W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test. * * *

The court concluded that under its findings as to the nature of Mal Bros. Contracting Company, set forth at 477a-488a,[2] the records here sought were of an "impersonal nature" held in a representative capacity by petitioner Malanga, and not his "private records" (487a). The court of appeals affirmed this determination.[3]

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[2] The reference is to petitioners' appendix in the court of appeals, a copy of which we are loding with the Clerk of this Court.

[3] The court of appeals held alternatively that the test announced in *White, supra,* was dictum and not controlling

2. There is no reason for further review. The applicable standard for resolving questions of the sort involved here has been established in *White*. Thus, the controversy here presents only the narrow question whether the courts below correctly applied the *White* test. See, *e.g.*, *United States* v. *Silverstein*, 314 F.2d 789 (C.A. 2), certiorari denied, 374 U.S. 807. Petitioners argue that they did not because they looked to the financial size of the partnership rather than to its structure, and applied an impermissible balance sheet standard. See Pet. 9, 14-20; *United States* v. *Cogan*, 257 F. Supp. 170, 173-174 (S.D. N.Y.).

Although the courts below did note various facts indicating the financial size of the partnership entity, it is clear from the district court's findings that the result below turned on the structure of the partnership and not just its worth.[4] In addition to point-

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in light of subsequent cases where this Court had "routinely denied the 5th Amendment privilege to unincorporated associations without discussion of size, impersonality or other circumstances. *McPhaul* v. *United States*, 364 U.S. 372; *United States* v. *Fleischman*, 339 U.S. 349" (Pet. App. 9a). Insofar as the court below may have intended to imply that the Fifth Amendment privilege may never be successfully asserted by a partner as to partnership records, we need not agree. As the petition points out (Pet. 11), the *McPhaul* and *Fleischman* cases involved political organizations—the Civil Rights Congress and the Joint Anti-Fascist Refugee Committee—which clearly satisfied the test of *White*. Under that test, which we deem applicable here, some but not all partnerships may be such as to render appropriate a claim by a partner of the privilege against self-incrimination as to the partnership records.

[4] There is nothing improper, in our view, in the courts below observing that the partnership entity was large in a

ing out that Mal Bros. Contracting Company employs 150-200 persons with a payroll of about $1 million annually, has a separate engineering department, and annual receipts of approximately $10 million (excluding joint ventures with other companies), the district court specifically found that neither petitioner Malanga nor any of the general partners had engaged in the preparation of the books or records of the company or knew of their contents, and that "Mrs. Freedman [the general manager] runs the show, so to speak, from a bookkeeping angle" (486a). This combination of facts as to the nature of the partnership was sufficient to support the conclusions reached below that the records of Mal Bros. Contracting Company were in no sense imbued with a private or personal character as to petitioner Malanga. *United States* v. *Silverstein, supra;* compare *United States* v. *Cogan, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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financial sense. Clearly, financial size will often be linked with structural complexity and impersonality, the factors relevant under the *White* standard.

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